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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

SolarCity Corporation,

Plaintiff,

vs.

Salt River Project Agricultural Improvement
and Power District,

Defendant.

No. 2:15-CV-00374-DLR

**UPDATED JOINT PROPOSED
DISCOVERY PLAN**

1 The original Rule 16 conference was held in this case on May 29, 2015. It
2 concluded with an order concerning the scope of discovery pending resolution of the
3 motions to dismiss in this matter. Dkt. No. 46. The motions to dismiss have been
4 resolved (Dkt. No. 77; hereafter “the MTD Order”), and the parties will appear to
5 continue the Rule 16 conference on November 24, 2015. Dkt. No. 72.

6 Developments since May 29 have changed the positions in the parties’ original
7 discovery plan. Dkt. No. 43. The parties therefore jointly submit this Updated Joint
8 Discovery Plan.¹

9 **1. The parties who attended the meeting and assisted in developing the Plan.**

10 Plaintiff SolarCity Corporation (“SolarCity”) and Defendant Salt River Project
11 Agricultural Improvement and Power District (“the District”) attended the original March
12 19 meeting through their counsel of record at that time. On November 12, 2015, counsel
13 for SolarCity and the District engaged in a discovery meet-and-confer session during
14 which they agreed to submit an Updated Joint Discovery Plan.²

15 **2. A short statement of the nature of the case (3 pages or less), including a**
16 **description of each claim and defense.**

17 Plaintiff’s Statement.

18 The Court is familiar with the nature of the case from the motion to dismiss
19 briefing and SolarCity’s statement in the original Discovery Plan, which SolarCity
20 incorporates by reference.

21 ¹ SolarCity understands that the Court inquired today about the timing of this
22 submission. SolarCity notes that it proposed a joint statement to the District by email on
23 November 10 and provided a draft of its portions of the submission to the District on
24 Monday, November 16. Despite follow-up requests from SolarCity, the District delayed
25 sending its draft until 10:41am today, November 20, at that time adding arguments on the
26 merits that SolarCity believes go beyond the scope of this statement but nonetheless
27 required a response. SolarCity thereafter endeavored to revise the statement as quickly as
28 possible to permit its submission today.

² The District states that SolarCity’s revisions to this plan (as described by SolarCity
above in footnote 1) contain improper argument and factual mischaracterizations. The
District reserves the right to respond as necessary.

1 As narrowed by the MTD Order, the District’s conduct at issue constitutes a
2 scheme to monopolize or attempt to monopolize in violation of the Sherman Act (15
3 U.S.C. § 2) and the Arizona Uniform State Antitrust Act A.R.S. § 44-1403, as well as
4 intentional interference with SolarCity’s contracts and business expectancies.

5 The MTD Order applies the federal Local Government Antitrust Act (“LGAA”) to
6 foreclose antitrust damages under both federal and state law. The remaining tort damages
7 are more limited. Accordingly, in the absence of injunctive relief (the only relief the
8 Court’s Order leaves available to SolarCity as a matter of either federal or state antitrust
9 law), the District’s continuation of the near-complete exclusion of SolarCity and other
10 competitors from the relevant market causes SolarCity irreparable harm.

11 In light of the foregoing, and while reserving its right to appeal the LGAA and
12 other decisions, SolarCity is prepared to forgo tort damages, streamline discovery
13 (including because damages discovery and expert reports will not be necessary in the
14 current posture), and proceed to a prompt trial for a permanent injunction. SolarCity’s
15 revised proposals below reflect that streamlining.

16 The District attempts to use its statement of the case, below, to expand its motion
17 to dismiss briefing. Its discussion mischaracterizes both the monopolization case law and
18 this Court’s Order. Its goal—made clear below under item 13—is to reduce and delay
19 discovery based on a vague (and incorrect) assertion that SolarCity’s existing discovery
20 requests are somehow mooted, so that the District can continue its course of stonewalling
21 SolarCity’s discovery attempts. The District nowhere explains how seeking, as it
22 erroneously does, to *add* elements of proof to SolarCity’s burden under Section 2 is
23 consistent with arguing for *narrower* discovery.

24 The District moved to dismiss SolarCity’s monopolization claims by
25 mischaracterizing SolarCity’s complaint as requiring a “duty to deal” with a competitor.
26 SolarCity’s claims address conduct directed at penalizing *consumers who deal* with the
27 District’s competitors. The District’s suggestion that recent Supreme Court cases
28 constrain such claims is incorrect.

1 This Court’s MTD Order articulated the elements of a monopolization claim as
2 follows: “(1) the District has monopoly power, (2) it made a decision to change the
3 market, (3) this decision was motivated by a desire to restrict competition, and (4) the
4 decision has the effect of limiting competition.” MTD Order at 21:23-26; *see also Image*
5 *Tech. Svcs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1202 (9th Cir. 1997) (“*Kodak III*”)
6 (articulating the same elements as “monopoly power in the relevant market,” “willfully”
7 engaging in conduct to acquire or maintain that power, and antitrust injury).

8 The District seeks to make *Aspen Skiing* and this Court’s holding something they
9 are not. As relevant here, *Aspen Skiing* simply applied the longstanding § 2 law to the
10 particular facts of that case. *Aspen Skiing Co. v Aspen Highlands Skiing Corp.*, 472 U.S.
11 585, 602-04 (1985) (quoting and applying *Lorain Journal Co. v. United States*, 342 U.S.
12 143 (1951)). So did this Court. The issues in the Supreme Court’s *Trinko* decision and
13 related cases relate solely to the “duty to deal” issue; they do not define the substantive
14 elements that SolarCity must or will prove.

15 The District’s effort to argue that discovery can somehow be truncated because it
16 says “less restrictive alternatives” are not part of the Section 2 analysis incorrectly
17 truncates the factual analysis on which Section 2 depends. Section 2 determines whether
18 a monopolist’s conduct was “unnecessarily restrictive” or not. *Kodak II*, 125 F.3d at 1213.
19 Purported justifications that either (1) do not *promote competition* on the merits or (2)
20 amount to mere “pretext” are not legitimate. *Kodak III*, 125 F.3d at 1212 (“A plaintiff
21 may rebut an asserted business justification by demonstrating either that the justification
22 does not legitimately promote competition or that the justification is pretextual.”); *see also*
23 *Otter Tail Pwr. Co. v. U.S.*, 410 U.S. 366, 368, 380 (1973) (explaining that it is
24 insufficient for a utility to plead lost revenues as a procompetitive justification because the
25 law “assumes that an enterprise will protect itself against a loss by operating with superior
26 service, lower costs, and improved efficiency”). Accordingly, even were the District
27 correct about “less restrictive alternatives,” nothing about that conclusion removes factual
28 disputes, reduces the need for discovery, or forecloses proof regarding the District’s

1 intent, the District's need for the penalties it imposed, or whether the District's asserted
2 justifications are pretextual.

3 The District's Statement.

4 The District's pricing plans are entirely legitimate and lawful. The District enacted
5 its current pricing plans after careful review and public comment, and pursuant to the
6 procedures dictated by the Arizona legislature. SolarCity's claims therefore fail as a
7 matter of fact and law.³

8 The Court's October 27 order dismissed all antitrust damages claims against the
9 District, and all substantive antitrust claims except for a claim under Section 2 of the
10 Sherman Act seeking injunctive relief pursuant to *Aspen Skiing v. Aspen Highland Skiing*
11 *Corp.*, 472 U.S. 585 (1985). The viability of a claim under *Aspen Skiing* is governed by
12 the Supreme Court's decision in *Verizon Commc'ns Inc. v. Law Offices of Curtis V.*
13 *Trinko, LLP*, 540 U.S. 398 (2004), which is the Supreme Court's controlling interpretation
14 of *Aspen Skiing*. See, e.g., *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1131-
15 34 (9th Cir. 2004). Accordingly, in addition to the elements of a typical monopolization
16 case (e.g., relevant market, monopoly power, standing, etc.), SolarCity must prove, among
17 other things, that the District terminated a (1) voluntary, (2) profitable (3) prior course of
18 dealing with SolarCity that (4) resulted in the loss of short-term profits. *Trinko*, 540 U.S.
19 at 409.

20 If SolarCity proves a *prima facie* case under these requirements, the District then
21 has the opportunity to come forward with a legitimate business reason for its conduct.
22 Only if *no* legitimate reason exists for the District's "refusal to deal," may its conduct be
23 deemed anticompetitive. *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 838 F.2d 360,
24 368-369 (9th Cir. 1988) (holding that *a* business justification by a monopolist precludes
25 Section 2 liability); *City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1373,
26

27 ³ The District has answered Solar City's complaint (Doc. No. 79) and hereby incorporates
28 its affirmative defenses into this statement.

1 1379 (9th Cir. 1992) (holding that “even if the monopolist does refuse aid partially
2 because it wishes to restrict competition, ‘we determine antitrust liability by asking
3 whether there was a legitimate business justification for the monopolist’s conduct.’”)
4 (quoting *Image Tech. Service, Inc. v. Eastman Kodak Co.*, 903 F.2d 612, 620 (9th Cir.
5 1990)). Whether there were less restrictive means of accomplishing the District’s
6 business objectives is irrelevant. *See id.*, *Image Tech.*, 903 F.2d at 620 (“[T]here is no
7 least restrictive alternative requirement in the context of a Section 2 claim.”).

8 The Court’s October 27 Order also denied the District’s motion to dismiss based
9 on the state-action doctrine and A.R.S. § 12-820.01. The District believes that these
10 aspects of the October 27 ruling were in error—as was the determination that SolarCity’s
11 claims are not barred by the filed-rate doctrine—and that an interlocutory appeal is now
12 appropriate. *See* Doc. No. 43 (Joint Proposed Discovery Plan) at 4 (the District stating
13 that “an immediate appeal may be taken from a district court’s determination that the state
14 action immunity does not apply”). Accordingly, the proceedings should be stayed during
15 the pendency of an interlocutory appeal on the immunity issues.

16 However, should the case proceed, the District believes the scope of discovery in
17 this action should be proportionally narrower in light of the Court’s October 27 ruling,
18 and will be committed to moving expeditiously toward a determination that the current
19 pricing plans do not violate any federal or Arizona law.

20 **3. A description of the principal factual and legal disputes in the case.**

21 The principal factual and legal disputes⁴ remaining before this Court after the MTD
22 Order include:

- 23 i. The definition of the relevant product and geographic markets;

25 ⁴ The list is a combination of issues that both parties contend are relevant. An
26 issue’s inclusion in this list is not a concession of its relevance by either party, nor should
27 the absence of any issue be deemed a waiver. Moreover, by identifying an issue here,
28 neither party makes a representation as to whether a particular issue is of a factual or legal
nature for purposes of the litigation.

- ii. Whether the District has monopoly power within any relevant market;
- iii. Whether the District has obtained or maintained its monopoly power by means of anticompetitive conduct;
- iv. Whether SolarCity competes with the District;
- v. Whether SolarCity has standing to sue under federal and Arizona antitrust laws;
- vi. Whether the District has a legitimate business justification for its conduct;
- vii. Whether the District's intent or purpose was to create or maintain a monopoly;
- viii. Whether any of the District's professed business justifications are pretextual;
- ix. Whether the District's conduct has any procompetitive benefits and, if so, do they outweigh any anticompetitive effects;
- x. Whether SolarCity has been unlawfully excluded from a relevant market;
- xi. Whether SolarCity has suffered cognizable harm, and if so in what amount, as a result of the District's conduct;
- xii. Whether SolarCity has suffered or will suffer irreparable harm as a result of the District's conduct;
- xiii. Whether the District's conduct and mental state meets the standards for intentional interference torts;
- xiv. Whether the District engaged in tortious conduct; and whether there was any tortious conduct independent from the alleged anticompetitive conduct.
- xv. Whether the District is immune or otherwise exempt from any or all of SolarCity's claims under the state-action doctrine, filed rate

doctrines, or any other exception to, or immunity from the application of the antitrust laws or state and/or federal law;

xvi. Whether the District is immune from damages based on state law claims under Title 12 of the A.R.S.;

xvii. Whether SolarCity complied with Arizona's notice of claim statute; and

xviii. Whether SolarCity is entitled to any of the relief it seeks.

4. The jurisdictional basis for the case, citing specific jurisdictional statutes.

Plaintiff's Statement.

There is personal jurisdiction over the District in this District, including under 15 U.S.C. § 22, because the District is a resident of this District and the relevant conduct took place, and continues to take place, in this District. The Court has subject-matter jurisdiction over the Complaint under 28 U.S.C. §§ 1331 and 1337(a), as well as 15 U.S.C. § 22, because this includes claims arising under the antitrust laws of the United States. SolarCity and the District agree that the Court has supplemental jurisdiction over the state claims under 28 U.S.C. § 1367. Furthermore, this Court has diversity jurisdiction over the state claims in the Amended Complaint under 28 U.S.C. § 1332 because there is complete diversity between the parties and the matter in controversy exceeds \$75,000 before interest and costs.

The District's Statement.

The District does not believe that the Court needs to take any further action with respect to its jurisdiction following the October 27 Order at this time, but preserves its position that injunctive relief under the federal and state antitrust laws is barred by *inter alia* the state action and filed rate doctrines, and that state law damage claims are barred by the Johnson Act and Title 12 of the A.R.S.

5. Any parties that have not been served and an explanation of why they have not been served; and any parties which have been served but have not appeared.

All parties have been served and have appeared.

1 **6. A statement of whether any party expects to add additional parties to the case**
2 **or otherwise amend pleadings.**

3 No additional parties are anticipated at this time.

4 **7. A listing of contemplated motions and statement of the issues to be decided by**
5 **these motions (including motions under FRE 702-05).**

6 SolarCity does not at present contemplate filing any motions. Of course,
7 depending on developments during discovery, SolarCity may later decide to file
8 dispositive, or other, motions.

9 The District expects to file a motion to stay litigation in this Court pending
10 interlocutory review in the Ninth Circuit with respect to certain aspects of the Court's
11 October 27 Order—namely, the denial of the District's state-action and Title 12
12 immunities, and the denial of the District's motion to dismiss under the filed-rate doctrine.
13 The District also expects to file a motion for certification of those threshold issues
14 pursuant to 28 U.S.C. § 1292(b). If litigation proceeds in this Court, the District
15 contemplates filing a dispositive motion under FRCP 56 (and/or potentially under FRCP
16 12(c)) on the viability of SolarCity's claims, consistent with the requirements outlined
17 above, *supra* Section 2, and on any other dispositive basis that may arise in discovery.

18 The parties have disputes concerning discovery issues. If those disputes are not
19 mooted by or otherwise addressed at the Rule 16 conference, it is possible those or similar
20 disputes could require motion practice. The parties may also make additional procedural,
21 evidentiary, or expert-related motions as the case record develops.

22 **8. Whether the case is suitable for reference to arbitration or a US magistrate**
23 **judge for trial.**

24 The parties do not believe this matter is suitable for such reference.

25 **9. The status of related cases pending before other courts or other judges of this**
26 **Court.**

27 No related cases are pending before other courts or other judges of this Court.
28

1 **10. A statement of when the parties exchanged Federal Rule of Procedure 26(a)**
2 **initial disclosures.**

3 SolarCity and the District exchanged their initial disclosures on May 8, 2015, as
4 directed in this Court's March 19, 2015 Order. Dkt. No. 24.

5 **11. A discussion of necessary discovery, including:**

6 **a. The extent, nature, and location of discovery anticipated by the parties.**

7 Plaintiff's Statement.

8 The Court's order following the initial Rule 16(b) conference included the
9 following directives:

10 The Court instructs the parties to engage in the exchange of written
11 discovery. The parties are to complete the exchange of discovery currently
12 pending and to engage in good faith discussions regarding the production of
13 additional documents. The parties are to meet and confer to discuss the
production of data, production of contracts, and a list of the top priority
custodians.

14 Dkt. No. 46. Each side identified six priority custodians. SolarCity requested production
15 of contracts and data. The parties also agreed to production of certain additional discrete
16 and relatively small sets of documents (or disclosures via letter in lieu of responses to
17 certain requests for production).

18 SolarCity completed every one of its priority-discovery commitments. SolarCity's
19 document production was substantially complete on October 29 and fully completed on
20 November 9. Since the May 29 hearing, SolarCity has produced 19,827 custodial
21 documents and 137 additional documents in response to targeted requests (including
22 investor communications and Board materials). SolarCity also investigated and provided
23 information in detailed letters in lieu of responding to two additional requests that the
24 District identified as priorities.

25 Between the initial Rule 16(b) conference on May 29 and August 17, the District
26 (1) made a single production of documents it had already provided to media requestors
27 and (2) produced certain data that it had provided to its consultants during the price
28 process. The District did not do anything further until SolarCity indicated that it would

1 seek Court intervention on August 17.

2 The District began making custodial productions on September 4. But the District
3 stopped making custodial productions after October 9. By mid-November, the District
4 has produced only 5,215 custodial documents in total.

5 The District dragged its feet on the other priority requests. A few examples:

- 6 • Though SolarCity requested contracts on June 10, the District waited until
7 August 20 to inform SolarCity that the District had decided it would be too
8 burdensome to produce any contracts, and therefore intended not to produce
9 any at all. The District eventually produced just three contracts.
- 10 • On August 21, the District sent SolarCity media containing a large dataset.
11 However, the data was corrupted, for reasons that should be apparent to
12 anyone familiar with the format in which the data was kept (SAS). After
13 weeks of excuses, the District stopped responding to SolarCity's letters. To
14 date, the District has not produced the data in a usable format.
- 15 • The District agreed to review and begin producing its Board materials. It
16 represented on September 18 that the review was underway—but the
17 District produced no Board materials.
- 18 • The District agreed to supplement two of its interrogatory responses on June
19 17, represented in July that it would serve the supplemental responses that
20 month—and did not serve them until August 21.

21 For nearly six weeks, the District made no productions at all, explaining to
22 SolarCity on November 12 that it did not intend to continue producing documents because
23 it planned to seek a stay of the case pending a planned interlocutory appeal. The District's
24 position was that it need not commit to any production until it decided whether to take an
25 appeal—and assumed that its then-putative motion to stay pending the then-putative
26 appeal would be granted.

27 After the District saw the above language in SolarCity's first draft of a proposed
28 joint statement, the District changed its position, telling SolarCity that it intended a
"substantial" production before the November 24 hearing. The District also said there
would be some Board materials—but only *public* Board materials. The District confirmed
to SolarCity that the production (1) still would not constitute substantial completion of the
priority custodial requests; and (2) would not include a corrected copy of the corrupt
dataset that SolarCity has been requesting for months. The District sent a production

1 cover letter the on the day this submission was filed, but SolarCity has yet not received
2 the actual media.

3 In short, after evading its discovery obligations pending the motion to dismiss, the
4 District continued to refuse and obstruct meaningful discovery. Accordingly, SolarCity
5 respectfully requests that the Court, as part of a discovery plan Order following the
6 November 24 conference, order the District to complete no later than December 11, 2015
7 the priority discovery that the parties agreed during the motion-to-dismiss stage.⁵

8 The District now has decided it will seek interlocutory review of portions of the
9 Court's motion to dismiss decision and a stay pending appeal. SolarCity will oppose the
10 District's appeal and request for a stay. No exception to the final judgment requirement
11 permits the District to appeal the Court's state action doctrine or other rulings. *S.C. State*
12 *Board of Dental Examiners v. FTC*, 455 F.3d 436 (4th Cir. 2006) (state action doctrine
13 does not permit interlocutory appeal), *cert. denied*, 549 U.S. 1165 (2007). This is
14 especially so because, as the Ninth Circuit held and this Court correctly noted, there
15 remain disputed factual issues that overlap with the merits. *Will v. Hallock*, 546 U.S. 345,
16 349-50 (2006) (stating the collateral-order doctrine's "stringent" requirements); MTD
17 Order at 25 (citing *Cost Mgmt. Servs., Inc. v. Wash. Nat. Gas Co.*, 99 F.3d 937, 942-43
18 (9th Cir. 1996)). Moreover, this Court retains jurisdiction and remains free to move "the
19 case along consistent with its view of the case," thereby disincentivizing attempts to
20 "stall" litigation. *Britton v. Co-Op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990);
21 *see also* FJC, Manual for Complex Litigation (4th ed. 2004), § 15.12 ("Notwithstanding
22

23 ⁵ The District's sole complaint about SolarCity's discovery conduct relates to a work
24 product claim. The issue is this: As part of the complaint-drafting process, counsel and
25 businesspeople worked together to perform some analyses of the SEPPs. The District's
26 position is that those analyses lost their work product protection because they formed
27 some of the good faith bases for certain allegations in the complaint. The District has yet
28 to direct SolarCity to any authority for its argument that work product analyses lose
protection under these circumstances. Regardless, SolarCity produced non-work product
analyses to similar effect.

1 the pendency of an interlocutory appeal, the litigation usually proceeds as scheduled
2 through discovery and other pretrial steps toward trial.”).

3 SolarCity continues to require discovery into the District’s cost structure,
4 investments, and grid technology; historical and competitive information about the market
5 before and after the District’s challenged conduct; the motivations for the SEPPs;
6 alternatives to the SEPPs that the District considered, if any; anticipated and actual effect
7 of challenged conduct on the District, the District’s customers, and distributed generation
8 competitors; the District’s dealings and internal discussions and analyses concerning
9 distributed solar and other competitors or competitive technologies; the District’s
10 motivations and incentives (including its motivations as a private actor). Discovery will
11 include depositions, documents, electronically stored information, and data maintained by
12 the District, including its governing Boards and Councils. A significant portion of this
13 discovery should be covered by the District’s pending “priority” productions; the
14 remainder should be susceptible to completion in relatively few months.

15 SolarCity will also seek discovery from third parties, including the District’s
16 consultants, customers, and the members of the District’s governing Boards and Councils.

17 Finally, in the District’s statement below, it asserts that discovery related to the
18 “reasonableness” of the District’s rates and “less restrictive alternatives” are irrelevant.
19 The District leaves these assertions vague and cites no specific requests. And for good
20 reason: Even assuming it were right that those issues are “irrelevant” or can be neatly
21 segregated,⁶ the District can identify nothing that relates solely to them. The fact is, the
22 District’s challenged conduct was effected through the SEPPs. And the availability and
23 consideration of alternative structures remains relevant to the District’s justifications
24 (including whether any such justifications were pretextual or whether the District’s

25
26 ⁶ Such segregation is inappropriate. *See Continental Ore Co. v. Union Carbide &*
27 *Carbon Corp.*, 370 U.S. 690, 699 (1962) (antitrust plaintiffs “should be given the full
28 benefit of their proof without tightly compartmentalizing the various factual components
and wiping the slate clean after scrutiny of each”).

1 actions were necessary to accomplish the asserted justifications) and intent. For example,
2 if the District knew that a small and non-discriminatory change to the SEPPs would have
3 resolved any legitimate concern it had without harming competition, that shows intent and
4 undermines the concern's legitimacy by showing the concern was pretext.

5 In sum, while SolarCity has streamlined its discovery requests, antitrust discovery
6 is necessarily substantial because information key to SolarCity's case is held by others.
7 *Cf. Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962) (observing the importance
8 of fact proceedings "in complex antitrust litigation where motive and intent play leading
9 roles, the proof is largely in the hands of the [defense], and hostile witnesses thicken the
10 plot"); *Cyntegra, Inc. v. IDEXX Labs., Inc.*, 322 Fed. App'x 569 (9th Cir. 2009)
11 (approving discovery far broader than what SolarCity seeks—discovery without temporal
12 limitation into the issues at the "heart" of the antitrust case).

13 The District's Statement.

14 Despite the arguments that SolarCity makes in its statement above, the parties have
15 been working cooperatively in the discovery process. As a result, neither party has had to
16 bring any discovery disputes to the Court's attention in the nearly five months since the
17 last status conference. While the parties have worked together to avoid the necessity of
18 Court involvement, as SolarCity notes, the parties have had different views on the scope
19 of discovery.

20 In sum, SolarCity has sought broad-ranging discovery that goes to the limit of
21 relevance and beyond, while the District has sought to limit discovery during the motion-
22 to-dismiss briefing stage to priority items. SolarCity has also requested discovery on a
23 more expedited and costly basis than the District believes the Court contemplated at the
24 May 29 scheduling conference. Nonetheless, the District devoted a massive amount of
25 resources to the collection, review, and production of SolarCity's requested "priority" data
26 requests during the pendency of the motions to dismiss. At the same time, despite
27 SolarCity's assertion above that it has complied with its discovery obligations, SolarCity
28 has so far refused to produce relevant documents under what appears to be the assertion of

1 a specious claim of attorney work product. Meet and confer efforts on these and other
2 issues have been ongoing. Moreover, the District’s targeted priority document requests
3 during the pendency of the motions to dismiss were far less burdensome and onerous than
4 the demands for documents and data made by SolarCity during the same period. As a
5 consequence, a direct comparison of the parties’ relative progress on document
6 productions is not as straightforward as SolarCity suggests.

7 Now, however, after the resolution of the motions to dismiss, the parties appear to
8 be at a truly more consequential difference of opinion. First and foremost, the District
9 believes a stay should be entered until the resolution of interlocutory appellate
10 proceedings regarding its asserted immunities.⁷ Beyond the stay, the Court’s October 27
11 Order has narrowed the case substantially, and made much of SolarCity’s requested
12 discovery irrelevant. In particular, that Order states:

13 SolarCity does not challenge the District’s electricity rates as unreasonable,
14 but instead alleges the District imposed the rates to exclude it from the
15 market. Whether the rates are reasonable has no bearing on whether the
District engaged in anticompetitive conduct.

16 Order at 25. SolarCity, despite claiming that it is prepared to “streamline” its case, still
17 seeks categories of documents that go solely to the reasonableness of rates—which the
18 Court has already held to be irrelevant here (*see id.*)—and the availability of less
19 restrictive alternatives to the challenged rate increase, which is also irrelevant to
20 SolarCity’s remaining antitrust claim as a matter of law. *See, e.g., Oahu Gas Service*, 838
21 F.2d at 368-369; *Image Technical Service*, 903 F.2d at 620; *City of Anaheim*, 955 F.2d at
22 1379.

23 The burden and expense posed by these lines of inquiry are disproportionate to
24 their limited relevance, if any. This applies to both party discovery and the extensive third
25 party discovery SolarCity has sought. Without imposing the appropriate limitations at the

27 ⁷ Nonetheless, the District produced another set of documents to SolarCity on November
28 20. The District will make any subsequent productions at the direction of the Court.

1 outset, there is a risk that discovery will veer off course and expand into areas of
2 questionable to no relevance, and which under any scenario will result in discovery that is
3 vastly out of proportion to SolarCity's lone antitrust theory that survives. Accordingly,
4 the District believes that the parties should meet and confer further on discovery issues
5 while the District's motion to stay is pending in an effort to come to agreement on the
6 parameters and pace of discovery. In the event the motion is not granted, the District is
7 committed to working cooperatively with SolarCity to resolve any outstanding discovery
8 issues.

9 **b. Suggested changes, if any, to the discovery limitations imposed by the**
10 **FRCP.**

11 Plaintiff's Statement.

12 SolarCity believes that this case can be brought to trial with 35 requests for
13 production per side and 30 requests for admission per side.

14 SolarCity further proposes that each side may propound 20 interrogatories, plus up
15 to 5 additional interrogatories that only seek the basis of responses to the requests for
16 admission to which the other side's response was not, in its entirety, "ADMIT."

17 SolarCity also proposes that depositions (*i.e.*, all depositions that are not expert
18 depositions) during the fact-discovery period should be limited to a cumulative total of
19 120 hours or 20 fact depositions (whichever is reached first) for each side. For the sake of
20 clarity, multiple Rule 30(b)(6) notices may issue, and a witness offered as a Rule 30(b)(6)
21 witness on any topic(s) may be separately deposed as an individual fact witness to the
22 extent the Rule 30(b)(6) deposition was limited to the designated Rule 30(b)(6) topics. In
23 this respect, SolarCity notes that the District's initial disclosures already identify 11
24 District-employee witnesses and 7 third-party witnesses that the District may use to
25 support its claims or defenses. The District also provided a list of persons involved with
26 developing the SEPPs that includes an additional 3 District employees not on its initial
27 disclosures. That is a total of 21 witnesses who the District initially admits are relevant,
28 not even including Rule 30(b)(6) witnesses, experts, or individuals who SolarCity believes

1 have information that would support *its* case, such as individual customers and other
2 market participants.

3 In addition, SolarCity proposes that each expert may be deposed once following
4 the conclusion of that expert's report(s).

5 Finally, SolarCity proposes that each side may depose any witness that appears on
6 the other side's trial witness list but who was not deposed during the fact-discovery
7 period.

8 The District's Statement.

9 The District believes the Court's Discovery Limitations as set forth in its standard
10 Scheduling Order (at ¶3) are appropriate for this action. The District objects SolarCity's
11 proposal to double this Court's standard deposition limit (pursuant to FRCP 30(a)) from
12 10 to 20. As a compromise, however, the District would not object to expanding the 10
13 deposition limit for each side to accommodate additional depositions above 10 for each
14 retained expert who submits an expert report pursuant to FRCP 26(a)(2), with the limit for
15 all fact depositions remaining at 10. The District agrees with SolarCity that any such
16 expert should be deposed once, after the expert has submitted his or her report(s).

17 **c. The number of hours permitted for each deposition, unless extended by**
18 **agreement of the parties.**

19 The parties agree that all depositions should remain at the 7-hour-day default, with
20 the parties reserving the right to agree to different limits for certain depositions or to seek
21 an order permitting more than 7 hours for good cause.

22 **12. Proposed specific dates for each of the following (deadlines should fall on a**
23 **Friday unless impracticable).**

24 **a. A deadline for completion of fact discovery and disclosure pursuant to**
25 **Rule 26(a)(3).**

26 Plaintiff's Statement.

27 First, as discussed above, SolarCity respectfully requests that the Court order the
28 District to complete no later than December 11, 2015 the priority discovery that the

parties agreed during the motion-to-dismiss stage. Second, SolarCity proposes that all fact discovery should be complete by April 15, 2016. SolarCity also proposes the following interim deadlines and guidelines for discovery during the fact discovery period:

- Interrogatories, requests for admission, and requests for production should be served on or before March 1, 2016 (*i.e.*, 45 days prior to the fact discovery deadline).
- Production of documents responsive to any request for production served on or before December 1, 2015 should be completed by February 1, 2016, without limiting or modifying any earlier applicable deadlines imposed by any otherwise applicable rule. SolarCity believes that this interim deadline is necessary in light of the District's discovery conduct to date. The District has demonstrated that it will delay discovery, and use any ambiguity with respect to the scope and timing of discovery to obstruct development of SolarCity's case.
- The fact discovery deadline of April 15, 2016 should be subject to possible supplementation in advance of trial on a schedule to be set in connection with the trial.

The District's Statement.

If a stay is imposed, the District proposes that the Court convene a status conference after the resolution of all interlocutory appellate proceedings in the event that any aspect of the case survives appellate review. The District's proposes the deadlines below in the event that no aspect of the action is stayed during the pendency of an interlocutory appeal.

- Service of Interrogatories, requests for admission, and requests for production: May 2, 2016 (*i.e.*, 45 days prior to the fact discovery deadline)
- Fact Discovery Cut-Off: June 17, 2016
- FRCP 26(a)(3) pre-trial disclosures: Sixty days before trial.

1 **b. A deadline for complete disclosures of expert testimony.**

2 Plaintiff's Statement.

3 SolarCity proposes that expert disclosure be made in the manner set forth by the
4 Court's model Case Management Order, with the following specific dates:

- 5 • Plaintiff shall provide full and complete expert disclosures as required by
6 Rule 26(a)(2)(A)-(C) of the Federal Rules of Civil Procedure no later than
7 May 6, 2016.
- 8 • Defendants shall provide full and complete expert disclosures, including any
9 response or rebuttal to Plaintiff's expert disclosures, as required by Rule
10 26(a)(2)(A)-(C) of the Federal Rules of Civil Procedure no later than June 3,
11 2016.
- 12 • Plaintiff shall provide rebuttal expert disclosures, if any, no later than June
13 27, 2016. Rebuttal experts shall be limited to responding to opinions stated
14 by initial experts.

15 Alternatively, SolarCity is amenable to a schedule under which both parties'
16 experts make opening disclosures on May 6, 2016, and then both parties' experts make
17 rebuttal disclosures on June 27, 2016.

18 The District's Statement.

19 The District suggests that this Court structure expert disclosures according to its
20 standard Scheduling Order (at ¶5), with the following specific dates (in the event a stay is
21 not entered by the Court):

22 Plaintiff shall provide full and complete expert disclosures as required by Rule
23 26(a)(2)(A)-(C) of the Federal Rules of Civil Procedure no later than July 8, 2016.

24 The District shall provide full and complete expert disclosures as required by Rule
25 26(a)(2)(A)-(C) of the Federal Rules of Civil Procedure no later than August 10, 2016.

26 The parties' rebuttal expert disclosures, if any, shall be made no later than August
27 22, 2016. Rebuttal experts shall be limited to responding to opinions stated by initial
28 experts.

1 **c. A deadline for completion of all expert depositions.**

2 Plaintiff's Statement.

3 Expert depositions should be completed no later than July 22, 2016.

4 The District's Statement.

5 Expert depositions should be completed no later than September 16, 2016.

6 **d. A deadline for filing dispositive motions.**

7 Plaintiff's Statement. Dispositive motions and motions challenging expert opinion
8 testimony should be filed no later than August 26, 2016. SolarCity proposes that the
9 motions be heard in conjunction with a bench trial to follow soon thereafter, preferably by
10 the end of September 2016.

11 The District's Statement.

12 Dispositive motions and motions challenging expert opinion testimony should be
13 filed no later than October 14, 2016 (i.e., four weeks after the close of expert discovery),
14 and decided in advance of any trial date set by the Court.

15 **e. A date by which the parties shall have engaged in good faith settlement**
16 **talks.**

17 As the parties represented in the initial discovery plan, they will engage in good
18 faith settlement discussions within 30 days following the MTD Order (*i.e.*, before
19 November 27, 2015). That process has begun with a preliminary call among counsel on
20 November 16, 2015.

21 **13. Whether a jury has been requested and whether the request for a jury trial is**
22 **contested (if the request is contested, set forth separately).**

23 In light of the MTD Order's ruling on the LGAA, and reserving its right to appeal,
24 SolarCity is prepared to proceed to a bench trial on all remaining issues in the case,
25 consolidated with a hearing on injunctive relief.

1 **14. The estimated length of trial and any suggestions for shortening trial.**

2 The parties anticipate that trial will take 1-2 weeks (assuming full trial days). The
3 parties will work together on ways to shorten the trial as the record develops.

4 **15. The prospects for settlement, including any request of the Court for assistance**
5 **in settlement efforts.**

6 Plaintiff's Statement.

7 SolarCity believes that reasonable, non-discriminatory, non-anticompetitive
8 alternatives to the District policies exist that could form the basis for settlement.
9 SolarCity has reached out to the District to explore the prospects for negotiation or
10 mediation along these lines. SolarCity remains committed to an efficient resolution of the
11 dispute, both during and after further discovery. To that end, SolarCity would be
12 amenable to the Court's assistance, if necessary. Otherwise, SolarCity is prepared to
13 undertake settlement discussions on a private basis.

14 The District's Statement.

15 The District is committed to an efficient resolution of this dispute and is open to
16 assistance for resolving the matter through the Court or otherwise, but remains obligated
17 to adhere to the rate-making procedures enacted by the Arizona legislature.

18
19 * * *

16. Any other matters that will aid the Court and parties in resolving this case in a just, speedy, and inexpensive manner as required by FRCP 1.

Plaintiff's Statement.

SolarCity respectfully refers the Court to SolarCity's statement in response to item 15 above.

The District's Statement.

The District respectfully refers the Court to its statement in response to section 15 above.

Dated: November 20, 2015

Respectfully Submitted,

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By: s/Steven C. Holtzman

Steven C. Holtzman

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Dated: November 20, 2015

Respectfully Submitted,

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